

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

SALLY HOOD, as Personal Representative of  
the ESTATE OF TIMOTHY H. SMITH, Deceased,

Plaintiff,

v.

CIV NO. 05- 638 MV/ACT

AMEX ASSURANCE COMPANY,

Defendant.

**PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

Chief Judge Martha Vázquez entered an Order of Reference [Doc. No. 33] directing the Magistrate Judge to hold a fairness hearing with the parties and the Guardian ad Litem and make recommendations on the fairness of the settlement with the minor child. Having done so, the Magistrate Judge makes the following proposed findings and recommendations.

**PROPOSED FINDINGS**

1. The parties, through their attorneys, and the Guardian ad Litem appointed for the minor child appeared for a hearing on December 14, 2005 in the Gila Courtroom, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Albuquerque, New Mexico before Magistrate Judge Alan C. Torgerson. In preparation for the fairness hearing, the Magistrate Judge reviewed the report of the Guardian ad Litem [Doc. No. 30] and the proposed Order.

2. Timothy C. Smith, a civilian contractor, was killed in Iraq. Brandi Smith, age 12, is the

child and sole heir of Mr. Smith. The Defendant, Amex Assurance Company, had previously issued a life insurance policy upon Mr. Smith but had not paid the proceeds under the policy because of an “act of war or terrorism” exclusionary clause. The Defendant’s refusal to pay the insurance proceeds led to the filing of this lawsuit.

3. The parties settled their dispute for \$180,000 during a settlement conference conducted by Magistrate Judge Alan C. Torgerson.

4. The Plaintiff, the Defendant and the Guardian ad Litem agreed to have Magistrate Judge Alan C. Torgerson conduct the fairness hearing and waived all potential conflicts that might arise because he conducted the settlement conference.

5. Sally Hood is the personal representative of the estate of Timothy C. Smith, her former husband. Brandi Smith, age 12, is the child of Sally Hood and Timothy C. Smith. Brandi currently lives with her mother, Ms. Hood.

6. Sally Hood testified at the hearing. She explained that, on the advice of and with the help of counsel, nearly all the net proceeds of the settlement with the Defendant will be placed in an irrevocable educational trust for the sole benefit of Brandi Smith. The educational trust will be managed by Morgan Stanley. Ms. Hood will be the trustee. A successor trustee, Brandi’s uncle, has also been named.

7. Ms. Hood testified that she understood her role as trustee and understood that the irrevocable educational trust was for the sole benefit of her daughter Brandi and could only be used according to the terms of the trust agreement. Brandi, currently in middle school, has plans to go to college.

8. Ms. Hood also explained that other funds were currently available to Brandi because

Brandi had received proceeds from Social Security and proceeds from the sale of Mr. Smith's personal property and belongings, including a semi-truck. Those funds, in interest bearing savings and checking accounts, are currently being used for some of Brandi's personal expenses such as clothing.

9. The Defendant Amex Assurance Company has agreed to pay the fee of the Guardian ad Litem.

10. Plaintiff's attorney fees are 25% of the settled amount or \$45,000, an amount the Magistrate Judge finds reasonable in this case.

11. Of the remaining \$135,000 of the settlement, between \$125,000 and \$130,000 will be placed in the irrevocable educational trust. The other \$5,000 to \$10,000 will be place in an interest bearing account for the use and benefit of Brandi.

12. The Guardian ad Litem reviewed the merits of the case and has recommended that proposed settlement be approved provided that the proceeds are used for the benefit of the minor child. At the hearing, the Guardian ad Litem recommended that the proposed use of the funds be approved as in the best interests of the minor child.

13. The Magistrate Judge finds that the settlement of this lawsuit in the amount of \$180,000 is fair to the minor child.

14. The Magistrate Judge further finds that placing \$125,000 to \$130,000 of the proceeds of the settlement in an irrevocable educational trust is in the best interest of the minor child. The proposed use of the remainder of the proceeds, \$5,000 to \$10,000, for the current benefit and use of the minor child, is also in her best interest.

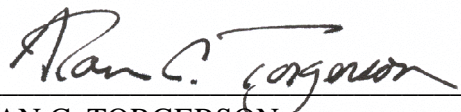
RECOMMENDED DISPOSITION

15. The Magistrate Judge recommends that both the proposed settlement of this case and the proposed use of the settlement proceeds for the benefit of the minor child be approved as fair and reasonable. The Magistrate Judge also recommends that the settlement and the proposed use of the proceeds be approved as being in the best interests of Brandi Smith, the minor child.

NOTIFICATION

THE PARTIES ARE NOTIFIED THAT WITHIN TEN (10) DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition, they may file written objections with the Clerk of the United States District Court, Pete V. Domenici United States Courthouse, 333 Lomas Blvd. NW, Albuquerque, NM 87102, pursuant to 28 U.S.C. §636 (b)(1). A party must file any objections within the ten (10) day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

THE PARTIES MAY ALSO WAIVE the ten day period for filing written objections if they so desire.

  
ALAN C. TORGERSON  
UNITED STATES MAGISTRATE JUDGE